

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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BRUCE VANDENBRINK,

Plaintiff-Appellant,

v

KEVIN MILLER, ENTERPRISE HEATING  
AND COOLING, INC, BRYCE'S EXPERT  
SERVICE, INC, and TAMMIE MILLER,

Defendants-Appellees.

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UNPUBLISHED

April 25, 2013

No. 305022

Kent Circuit Court

LC No. 09-00692-CK

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

This case arises from the business dealings between plaintiff and defendant Kevin Miller. On appeal, only plaintiff's claims against Kevin's wife, Tammie Miller, are at issue. The trial court dismissed plaintiff's claims of conversion, fraudulent misrepresentation and unjust enrichment, and later granted Tammie sanctions against plaintiff. We affirm the dismissal of plaintiff's claims against Tammie Miller, but reverse the award of sanctions because the claims were not wholly without legal merit at the time they were asserted.

**I. FACTS**

Kevin Miller was in the business of "flipping" houses—buying properties, fixing them up, and quickly reselling them. He also did heating and cooling work. He conducted business through Enterprise Heating and Cooling, Inc (Enterprise) and Bryce's Expert Service, Inc (Bryce's). He was the sole shareholder of each corporation. Plaintiff lent money to Kevin a number of times over the course of several years to finance the house flipping operations. Kevin repaid these loans, by and large in a timely manner, until 2005, when he stopped making payments altogether.

Neither the loans nor the payments were well documented. Two loans were made via written promissory notes from Enterprise, personally guaranteed by Kevin Miller. The only documentation of other loans consists of checks written by plaintiff to Kevin Miller personally, sometimes with references to specific properties, as well as some receipts written by Kevin stating the amount of money received "for investment of real estate property of [address]." Most of the money went through the Bryce's corporate account, but some of the money also went through the Millers' joint personal account.

Plaintiff testified that each loan was tied to a specific property. However, after Kevin defaulted, plaintiff learned that Kevin had already sold some of the properties without paying plaintiff. Plaintiff began presenting monthly statements of the outstanding loans to Kevin for signature. Tammie also signed these statements when she was present.

Tammie Miller did not sign the promissory notes, and was not a shareholder in Enterprise or Bryce's. She sometimes did office work for Enterprise and Bryce's, but did not draw any salary for that work. Plaintiff never paid any money to Tammie personally, and she did not sign any of the receipts. Tammie did have check-writing authority, both for the Millers' personal account and the Bryce's business account, and she wrote some of the checks to plaintiff. Neither account was used exclusively for Kevin's real estate business—funds also entered the accounts from other sources and were spent on other things, including personal expenses.

Plaintiff testified that he assumed Tammie was in business with Kevin. He never told Tammie that the loans were to be used exclusively for buying and improving houses. He believed that Tammie was liable because she was a signatory on the accounts where plaintiff's money was deposited, she signed checks going to Miller family friends rather than plaintiff and for personal expenses, and she signed statements plaintiff brought to Kevin's business. He admitted that he had no information to indicate that Kevin ever failed to purchase a property for which plaintiff loaned him money.

The case was tried in a bench trial. After plaintiff rested at trial, Tammie made a motion for involuntary dismissal of the claims against her. The trial court granted the motion with regard to the conversion and fraudulent misrepresentation claims, but found that a question of fact existed regarding the claim of unjust enrichment. The court again refused to dismiss the unjust enrichment claim at the close of proofs. However, the court's opinion and order issued April 18, 2011 did dismiss the final count against Tammie.<sup>1</sup> At a subsequent hearing on July 28, 2011, the court found that "based on [plaintiff]'s own testimony, that there really was not a shred of evidence on the basis of which Mrs. Miller could be found to have been a party who received a loan or was otherwise liable or responsible to [plaintiff] in these transactions." The court therefore held that plaintiff's claims against Tammie were frivolous, and granted her \$40,146.01 in sanctions against plaintiff under MCL 600.2591.<sup>2</sup>

## II. STANDARD OF REVIEW

"[A] motion for involuntary dismissal calls upon the trial judge to exercise his function as trier of fact, weigh the evidence, pass upon the credibility of witnesses and select between

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<sup>1</sup> That order stated that all counts had been dismissed via an order on April 13, 2011 and were only included in the new order for clarification, but the earlier order did not mention the unjust enrichment count.

<sup>2</sup> The trial court also awarded Tammie Miller \$15,151.04 in case evaluation sanctions against plaintiff. Because plaintiff has not appealed the case evaluation sanctions, this appeal concerns only the \$40,146.01 awarded solely under MCL 600.2591.

conflicting inferences.” *Marderosian v Stroh Brewery Co*, 123 Mich App 719, 724; 333 NW2d 341 (1983). This Court reviews the decision to grant or deny a motion for involuntary dismissal under the clearly erroneous standard, and the trial court “will not be overturned unless the evidence manifestly preponderates against the decision.” *Sullivan Industries, Inc v Double Seal Glass Co, Inc*, 192 Mich App 333, 339; 480 NW2d 623 (1991).

Similarly, “[a] trial court’s finding that an action is frivolous is reviewed for clear error. A decision is clearly erroneous where, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.” *Kitchen v Kitchen*, 465 Mich 654, 661-662; 641 NW2d 245 (2002).

### III. ANALYSIS

With regard to the conversion claim, the trial court found that while Tammie received money from the accounts at issue, those accounts also contained funds that did not come from plaintiff. There was another investor in Kevin Miller’s real estate business, as well as some cash flow from Kevin’s heating and cooling business. The trial court also found no evidence that Kevin failed to purchase any of the properties that he was supposed to purchase. These factual findings are not clearly erroneous. Given these findings, it was not error to dismiss the claim for conversion.

Conversion is “any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.” *Lawsuit Financial, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004) (internal quotation omitted). Plaintiff asserts that he lent money to Kevin on the condition that Kevin buy specific properties. This may have been sufficient for plaintiff to retain title to the funds. See *People v Mason*, 247 Mich App 64, 76-77; 634 NW2d 382 (2001) (stating that when money is transferred for a specific purpose, the recipient takes possession but not title).<sup>3</sup> However, the trial court found no evidence that Kevin failed to buy any of the relevant properties, so there is no evidence that the purpose of the loans was frustrated. Further, the court found that plaintiff did not prove that Tammie used any of plaintiff’s funds, given that plaintiff’s money was commingled with other funds. Therefore, the trial court did not err in dismissing the conversion claim.

Dismissal of the fraudulent misrepresentation claim was also proper. The elements of fraudulent misrepresentation are 1) a material representation, 2) the representation was false, 3) the defendant knew the statement was false or made it recklessly without regard for the truth, 4) the defendant intended that the plaintiff would rely on the statement, 5) the plaintiff did rely on it, and 6) the plaintiff suffered damage. *Bergen v Baker*, 264 Mich App 376, 382; 691 NW2d 770 (2004). The trial court found that the only misrepresentation even alleged was that Tammie sometimes lied about Kevin’s whereabouts. The court correctly concluded that these misrepresentations were entirely immaterial to the transactions between plaintiff and Kevin. The

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<sup>3</sup> The trial court did not make specific findings of fact on this point. It may also be that the requirement to purchase a specific property with each loan was merely an element of the contract between Kevin and plaintiff, and that Kevin was free to spend any excess as he saw fit.

misrepresentations had no impact on whether plaintiff lent Kevin money or on the amount of the loans that Kevin repaid. On appeal plaintiff argues that Tammie also made misstatements by signing statements listing the properties purportedly owned by Kevin. However, these statements were signed after Kevin stopped making payments, and cannot have caused plaintiff to suffer any further damages. In addition, it is not clear that Tammie knew the statements were inaccurate. Therefore, the court correctly dismissed plaintiff's claim of fraudulent misrepresentation against Tammie.

The unjust enrichment claim required plaintiff to prove that Tammie retained "money or benefits which in justice and equity belong to another." *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952). However, as discussed above, plaintiff failed to prove that Tammie used any money that was meant to have been spent on acquiring and improving houses. Therefore, the trial court did not err in dismissing plaintiff's unjust enrichment claim against Tammie.

We thus conclude that the trial court properly dismissed all of plaintiff's claims against Tammie Miller. However, we do not agree that the suit was frivolous. By statute, a suit is frivolous if "the party's legal position was devoid of arguable legal merit." MCL 600.2591(3).<sup>4</sup> "To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made." *In re Costs and Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002).

When explaining its reasons for granting sanctions, the trial court stated:

[I] concluded, based on [plaintiff]'s own testimony, that there really was not a shred of evidence on the basis of which Mrs. Miller could be found to have been a party who received a loan or was otherwise liable or responsible to [plaintiff] in these transactions.

Not only was there no written documentation, there was no oral testimony which would substantiate that, and the basis of the claim was simply that, since she was the wife of Mr. Miller and was kind of present when a lot of this was going on, that she must, somehow or other by operation of law, have acquired some legal responsibility for these debts, which is a rather unique, and indeed, in my view unfounded theory.

The trial court is correct that there was very little evidence at trial that would point to liability for Tammie Miller. The claim for fraudulent misrepresentation, in particular, was clearly unsupported because Tammie made no representations to plaintiff that could have conceivably caused him to lose additional money.

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<sup>4</sup> A suit is also frivolous if initiated for the purpose of harassment or if there was no basis to believe that the underlying facts were true, but those grounds are not asserted in this case. MCL 600.2591(3).

On the other hand, at the time the complaint was filed plaintiff may reasonably have expected that he would be able to show that Tammie benefitted from misuse of his money. If plaintiff could have proven that Tammie used plaintiff's money for her own benefit, his claims for conversion and unjust enrichment might have prevailed. Moreover, the trial court refused to dismiss the unjust enrichment claim twice at trial—after the plaintiff rested and again at the close of all proofs. As plaintiff points out, if the unjust enrichment claim were truly frivolous, the trial court should have had no qualms about dismissing it after plaintiff finished presenting evidence.

Because the frivolousness of an action must be determined with respect to what the plaintiff knew at the time the claim was filed, we conclude that the trial court clearly erred in finding that plaintiff's claims in this case were frivolous. Therefore, the trial court erred by granting sanctions to Tammie Miller because plaintiff's claims were not devoid of arguable legal merit.

Affirmed in part and reversed in part. Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald  
/s/ Peter D. O'Connell  
/s/ Douglas B. Shapiro